

**THE MARYLAND JUDICIARY'S FOSTER CARE  
COURT IMPROVEMENT PROJECT**

***GUIDELINES OF ADVOCACY FOR ATTORNEYS  
REPRESENTING CHILDREN IN CINA AND RELATED TPR  
AND ADOPTION PROCEEDINGS***

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## ***FOREWORD***

**In February 1998, Maryland's Foster Care Court Improvement Project (FCCIP), Representation Subcommittee, the Hon. Patrick L. Woodward (Circuit Court for Montgomery County), Chair, commenced the task of developing standards of practice for attorneys representing children in child-in-need-of-assistance (CINA) and related termination of parental rights (TPR) and adoption cases. A comprehensive assessment of the performance of juvenile courts had recommended the development of uniform standards of practice for attorneys to better ensure the provision of quality legal services for children.**

**Practitioners have adopted differing roles when appointed to represent children in CINA and related cases. Consistent with American Bar Association standards, and Maryland Rule of Professional Conduct 1.14 (client under a disability), many attorneys represent the child-client as an advocate. Others view their role similar to a *guardian ad litem* whose function is to determine the best interests of the child-client. As a result, confusion about the appropriate role of child's counsel has existed among lawyers, juvenile court judges and masters, as well as child welfare experts directly and indirectly involved in CINA practice.**

**In November 1999, the Hon. Robert M. Bell, Chief Judge, Maryland Court of Appeals, submitted the FCCIP proposed uniform standards to the Standing Committee on Rules of Practice and Procedure, Hon. Joseph F. Murphy, Jr., Chair. On June 16, 2000, the Rules Committee approved the newly entitled *Guidelines of Advocacy for Attorneys Representing Children in CINA and Related TPR and Adoption Proceedings* for inclusion in the appendix to the Rules of Professional Conduct with reference in the comment to Rule 1.14. On February 5, 2001, the Court of Appeals adopted the *Guidelines of Advocacy* as proposed effective July 1, 2001.**

**The purpose of the FCCIP is to enable the juvenile court to better serve and protect our community's most vulnerable and least empowered population—maltreated children. By clarifying the role and responsibilities of children's attorneys, the *Guidelines of Advocacy* will significantly improve the handling of CINA and related TPR and adoption cases by Maryland's juvenile courts.**

**Hon. Patrick L. Woodward  
February 23, 2001**

## **ACKNOWLEDGMENTS**

The FCCIP would like to express its appreciation to the Hon. Robert M. Bell, Chief Judge, Maryland Court of Appeals, and Frank Broccolina, State Court Administrator, Administrative Office of the Courts, for their support in its effort to improve the juvenile courts' handling of CINA and related TPR and adoption cases. We are especially grateful to the Hon. Joseph F. Murphy, Jr., Chair, Standing Committee on Rules of Practice and Procedure, and Linda M. Schuett, Esq., Vice-Chair, and Albert D. Brault, Esq., Chair, Attorney Subcommittee, for their guidance to the FCCIP's Representation Subcommittee in developing the *Guidelines of Advocacy* and support in securing its meaningful inclusion in the Maryland Rules of Professional Conduct.

We extend a special note of appreciation to members and staff of the Standing Committee on Rules of Practice and Procedure. In particular, we thank Lowell R. Bowen, Esq., for his contribution as a wordsmith to the *Guidelines of Advocacy*, and Roger W. Titus, Esq., Attorney Subcommittee, for his assistance in drafting the amended comment to Rule 1.14. A special note of thanks to the Hon. G.R. Hovey Johnson, Circuit Court for Prince George's County, and the Hon. Joseph H. H. Kaplan, Circuit Court for Baltimore City, for their steadfast support.

The FCCIP recognizes the dedication of judges, masters, attorneys, social workers, and other professionals to the development of the *Guidelines of Advocacy*. We thank the Hon. Pamela L. North, Circuit Court for Anne Arundel County for her input and expertise. We thank Master Linda Koban, Circuit Court for Baltimore City; Robyn Scates, Director, Maryland Legal Services Program; Rhonda B. Lipkin, Esq., Legal Aid Bureau, Inc.; and, Mitchell Y. Mirviss, Esq., Venable, Baetjer and Howard, LLP, for their support and participation in the Rules Committee process. We extend a special note of thanks to Eva J. Klain, Esq., American Bar Association, Center for Children and the Law, for her expertise and assistance.

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**MARYLAND RULES OF PROFESSIONAL CONDUCT**  
**RULE 1.14**  
**AMENDED COMMENT**

**Rule 1.14. Client under a disability.**

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

**COMMENT**

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

**A lawyer representing a person under disability should advocate the position of the disabled person unless the lawyer reasonably concludes that the client is not able to make a considered decision in connection with the matter. This is especially important in cases involving children in Child In Need of Assistance (CINA) and related Termination of Parental Rights (TPR) and adoption proceedings. With respect to these categories of cases, the Maryland Foster Care Court Improvement Project has prepared Guidelines of Advocacy for Attorneys Representing Children in CINA and Related TPR and Adoption Proceedings. The Guidelines are included in an appendix to these Rules.**<sup>1</sup>

If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2 (d).

*Disclosure of the client's condition.* -- Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

**Code Comparison.** -- There is no counterpart to this Rule in the Disciplinary Rules of the Code. EC 7-12 states that "Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the

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<sup>1</sup> *Amendment adopted by the Court of Appeals on February 5, 2001, and effective on July 1, 2001.*

advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent."

Quoted in *Auclair v. Auclair*, 127 Md. App. 1, 730 A. 2d 1260 (1999).

Cited in *John O. v. Jane O.*, 90 Md. App. 406, 601 a. 2d 149 (1992); *In re Lee*, 132 Md. App. 696, 754 A. 2d 426 (2000).

**ANNOTATED CODE OF MARYLAND  
MARYLAND RULES  
APPENDIX**

***GUIDELINES OF ADVOCACY FOR ATTORNEYS  
REPRESENTING CHILDREN IN CINA AND RELATED TPR  
AND ADOPTION PROCEEDINGS***

***STATEMENT OF THE ISSUE***

The Maryland Foster Care Court Improvement Project has developed these Guidelines of Advocacy for Attorneys Representing Children in Child in Need of Assistance (CINA) and Related Termination of Parental Rights (TPR) and Adoption Proceedings. The courts' ability to protect the interests of children rests in large part upon the skill and expertise of the advocate. An attorney should represent a child who is the subject of a CINA or a related TPR or adoption proceeding in accordance with these Guidelines. Nothing contained in the Guidelines is intended to modify, amend, or alter the fiduciary duties that an attorney owes to a client pursuant to the Maryland Lawyers' Rules of Professional Conduct. For purposes of these Guidelines, the word *child* refers to the client of the attorney.

***A. ADVOCATE FOR THE CHILD***

**GUIDELINE A. ROLE OF THE CHILD'S COUNSEL**

The attorney should determine whether the child has considered judgment as defined in Guideline B1. If the child has considered judgment, the attorney should so state in open court and should advocate a position consistent with the child's wishes in the matter. If the attorney determines that the child lacks considered judgment, the attorney should so inform the court. The attorney should then advocate a position consistent with the best interests of the child as defined in Guideline B2.

## ***B. CONSIDERED JUDGMENT***

### **GUIDELINE B1. ASSESSING CONSIDERED JUDGMENT**

The attorney should advocate the position of the child unless the attorney reasonably concludes that the child is unable to express a reasoned choice about issues that are relevant to the particular purpose for which the attorney is representing the child. If the child has the ability to express a reasoned choice, the child is regarded as having considered judgment.

- a. To determine whether the child has considered judgment, the attorney should focus on the child's decision-making process, rather than the child's decision. The attorney should determine whether the child can understand the risks and benefits of the child's legal position and whether the child can reasonably communicate the child's wishes. The attorney should consider the following factors when determining whether the child has considered judgment:
  - (1) the child's developmental stage:
    - (a) cognitive ability,
    - (b) socialization, and
    - (c) emotional and mental development;
  - (2) the child's expression of a relevant position:
    - (a) ability to communicate with the attorney, and
    - (b) ability to articulate reasons for the legal position; and
  - (3) relevant and available reports such as reports from social workers, psychiatrists, psychologists, and schools.
- b. A child may be capable of considered judgment even though the child has a significant cognitive or emotional disability.
- c. At every interview with the child, the attorney should assess whether the child has considered judgment regarding each relevant issue. In making a determination regarding considered judgment, the attorney may seek

guidance from professionals, family members, school officials, and other concerned persons. The attorney should also determine if any evaluations are needed and advocate for them when appropriate. At no time shall the attorney compromise the attorney-client privilege.

- d. An attorney should be sensitive to cultural, racial, ethnic, or economic differences between the attorney and the child because such differences may inappropriately influence the attorney's assessment of whether the child has considered judgment.

## **GUIDELINE B2. BEST INTEREST STANDARD**

When an attorney representing a child determines that the child does not have considered judgment, the attorney should advocate for services and safety measures that the attorney believes to be in the child's best interests, taking into consideration the placement that is the least restrictive alternative. The attorney may advocate a position different from the child's wishes if the attorney finds that the child does not have considered judgment at that time. The attorney should make clear to the court that the attorney is adopting the best interest standard for that particular proceeding and state the reasons for adopting the best interest standard as well as the reasons for any change from a previously adopted standard of representation. Even if the attorney advocates a position different from the child's wishes, the attorney should ensure that the child's position is made a part of the record.

## ***C. CLIENT CONTACT***

### **GUIDELINE C1. GENERAL**

The attorney should meet in the community with the child at each key stage of the representation to conduct a meaningful interview. The attorney should meet the child in preparation for a hearing, regardless of the child's age or disability, in an environment that will facilitate reasonable attorney-client communications. The attorney is encouraged to meet with the child in multiple environments, including the child's school, placement, each subsequent placement, or home.

When face-to-face contact with a child is not reasonably possible or

not necessary, the attorney still should have meaningful contact with the child. These situations may include: (a) a child placed out-of-state; (b) a teenager with whom the attorney has established a sufficient attorney-client relationship; or (c) a child under the age of three at the shelter care proceeding. The attorney, however, should have face-to-face contact with the child prior to the adjudication hearing.

When a communication with the child requires a sign or spoken language interpreter, the attorney should try to use the services of a court-related interpreter or other qualified interpreter other than the child's family, friends, or social workers.

## **GUIDELINE C2. DETERMINATIONS**

After conducting one or more interviews with a child and giving reasonable consideration to the child's age and cognitive and emotional development, the attorney should determine, at a minimum:

- a. whether the child has considered judgment;
- b. whether the presence of the child at the proceedings will be waived, i.e., whether the child wants or needs to be present at the hearing or whether the child will be harmed by appearing in court;
- c. the child's position on the agency's petition, court report(s), and other relevant issues, including the permanency plan and placement;
- d. the child's position on evidence that may be offered at the hearing, including evidence that may be offered on behalf of the child;
- e. the child's legal position at the hearing;
- f. whether there is a conflict of interest that requires the attorney to move to withdraw from representing one or all of the clients as, for example, when the attorney represents siblings;
- g. whether the child should be called as a witness, after considering such factors as (1) the child's age, (2) the child's cognitive and emotional development, (3) the child's need or desire to testify, (4) the likelihood

of emotional trauma or repercussions to the child, (5) the necessity of the child's direct testimony, and (6) the availability of other evidence, hearsay exceptions, proffers, or stipulations that can substitute for direct testimony; and

- h. if the child will be called as a witness, the setting of the child's testimony; for example, whether the child should testify in open court, open chambers, closed chambers, or another location.

### **GUIDELINE C3. ANCILLARY CONTACT WITH THE CHILD**

The attorney should have meaningful contact with the child at least every six months, even if a court hearing is not scheduled. The attorney should seek to obtain notice of emergencies and significant events involving the child between court hearings. Upon receiving notice of such an event (for example, a change of placement), the attorney should interview or observe the child within a reasonable time. As necessary or appropriate to the representation, the attorney should attend treatment, placement, and administrative hearings, and other proceedings, as well as school case conferences or staffing conferences concerning the child.

### **GUIDELINE C4. CONTINUITY OF REPRESENTATION**

The attorney should continue to represent the child after the initial court proceeding, including at disposition review hearings, permanency planning hearings, and related TPR and adoption proceedings.

## ***D. ATTORNEY INVESTIGATION***

### **GUIDELINE D1. INDEPENDENT INVESTIGATION**

The child's attorney should conduct a thorough and independent investigation as necessary or appropriate to the representation. This investigation may include the following:

- a. obtaining and reviewing the child's social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other records relevant to the case;

- b. interviewing or observing the child before all court hearings and when apprised of emergencies or significant events affecting the child;
- c. interviewing school personnel and other professionals and potential witnesses;
- d. interviewing the child's caretaker(s), with the permission of their attorney when necessary, concerning the type of services the child currently receives and the type of services the child needs; and
- e. reviewing all relevant evidence.

At each stage of the investigation, the attorney should be familiar with the child's position.

## **GUIDELINE D2. NON-VERBAL CHILD WITHOUT CONSIDERED JUDGMENT**

For a non-verbal child who does not have considered judgment, the attorney should observe that child in the child's environment and conduct a thorough investigation. The investigation should include, at a minimum, contact with the child's caretaker, teacher, physician, and caseworker to obtain information about the status of the child.

## ***E. INVOLVEMENT IN THE COURT PROCESS***

### **GUIDELINE E1. PRE-TRIAL STAGES**

- a. If the child has considered judgment, the attorney should develop a position and strategy concerning every relevant aspect of the proceedings. When developing the child's legal position, the attorney should ensure that the child is given advice and guidance and all information necessary to make an informed decision.
- b. The attorney should explain to the child in a manner appropriate to the child's level of development what is expected to happen before, during, and after each hearing.

- c. Consistent with the child's wishes, or the best interests of a child without considered judgment, the attorney should seek to obtain appropriate services, including services for children with physical, mental, or developmental disabilities.

## **GUIDELINE E2. TRIAL STAGES**

- a. The attorney should attend all hearings involving the child and participate in all telephone or other conferences with the court unless a particular hearing involves issues completely unrelated to the child.
- b. The attorney should present a case and make appropriate motions, including, when appropriate, introducing independent evidence and witnesses and cross-examining witnesses.
- c. During all hearings, the attorney should preserve legal issues for appeal, as appropriate.
- d. Consistent with the wishes of a child with considered judgment, the attorney should try to ensure timely hearings and oppose unwarranted continuances or postponements.

## **GUIDELINE E3. POST-TRIAL STAGES**

- a. Following the hearing, if consistent with the attorney's representation of the child's position, the attorney should seek a written court order to be given to the parties, containing at a minimum:
  - (1) required findings of fact and conclusions of law;
  - (2) the date and time of the next hearing;
  - (3) required notices;
  - (4) actions to be taken by each party, including the agency(ies), and custodians;

- (5) appropriate statutory timelines; and
  - (6) the names of the parties who were present at the hearing.
- b. The attorney should consider and discuss with the child the possibility and ramifications of an appeal and, when appropriate, take all steps necessary to note an appeal or participate in an appeal filed by another party.

## ***F. LAWYER TRAINING***

### **GUIDELINE F1. INITIAL TRAINING OR EXPERIENCE**

Before accepting a case, a lawyer who does not have sufficient experience in providing legal representation to children in CINA and related TPR and adoption cases should participate in formal training and education related to this area of practice. The lawyer should satisfy the court and, if applicable, the entity responsible for payment of the lawyer that the lawyer has sufficient skill and experience in child advocacy. The lawyer should participate in available training and education, including in-house training.

### **GUIDELINE F2. SUBSTANCE OF TRAINING**

Lawyers who seek to represent children in these proceedings are encouraged to seek training and education in such subjects as:

- a. the role of child's counsel;
- b. assessing considered judgment;
- c. basic interviewing techniques;
- d. child development: cognitive, emotional, and mental stages;
- e. federal and state statutes, regulations, rules, and case law;
- f. overview of the court process and key personnel in child-related litigation;

- g. applicable guidelines and standards of representation;
- h. family dynamics and dysfunction, including substance abuse and mental illness;
- i. related issues, such as domestic violence, special education, mental health, developmental disability systems, and adult guardianships;
- j. social service agencies, child welfare programs, and medical, educational, and mental health resources for the child and family; and
- k. written materials, including related motions, court orders, pleadings, and training manuals.

#### ***G. ROLE OF THE COURT***

If the court becomes aware that an attorney is not following these Guidelines, the court may encourage compliance by taking one or more of the following steps, as appropriate:

- a. alert the individual attorney that the attorney is not in compliance with the Guidelines;
- b. alert relevant government agencies or firms that the attorney is not complying with the Guidelines;
- c. alert the entity(ies) responsible for administering the contracts for children's representation that the attorney appointed to represent children is not complying with the Guidelines; and
- d. appoint another attorney for the child.